IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION Securities, Derivative & "ERISA" Litigation	§ § §	MDL Docket No. 1446
MARK NEWBY, et al., Plaintiffs, vs. ENRON CORPORATION, et al., Defendants.	§ § § § § § § §	Civil Action No. H-01-3624 And Consolidated Cases

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF CREDIT SUISSE FIRST BOSTON LLC'S MOTION TO COMPEL LEAD PLAINTIFF TO PROVIDE COMPLETE AND SPECIFIC ANSWERS TO ITS FIRST SET OF INTERROGATORIES

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Defendant Credit Suisse First Boston LLC (f/k/a Credit Suisse First Boston Corporation) ("CSFB") respectfully submits this reply memorandum of law in further support of its motion to compel Lead Plaintiff to provide complete and specific answers to CSFB's First Set of Interrogatories pursuant to Rule 37(a) of the Federal Rules of Civil Procedure.

Preliminary Statement

CSFB's interrogatories seek fundamental information concerning the facts underlying Lead Plaintiff's allegations against CSFB. This factual information is plainly discoverable, and, indeed, necessary to enable CSFB to prepare its defense in this action. Nevertheless, Lead Plaintiff has (i) refused to provide any answers at all to interrogatories asking Lead Plaintiff to identify basic facts—who said what to whom—concerning certain alleged statements quoted or referenced in the Complaint's allegations against CSFB (Interrogatory Nos. 15-17); and (ii) refused to provide full and meaningful answers to interrogatories asking Lead Plaintiff to identify the source of the quotations contained in the Complaint's allegations against CSFB (Interrogatory Nos. 18-19).

Instead of answering CSFB's interrogatories, Lead Plaintiff has provided a list of 39 witnesses that may have "discoverable information Lead Plaintiff may use to support its claims". (CSFB's Motion, Ex. A at Ex. A.) Through this list, Lead Plaintiff seeks to evade its discovery obligations and require CSFB to conduct a wasteful and unnecessary fishing expedition.[1] As explained below, its asserted justifications for doing so—that CSFB seeks to

[1] In the second sentence of its brief, Lead Plaintiff appears to suggest that this list of witnesses is sufficient because "many of those witnesses have been deposed or are on the July and August deposition schedule". (Opp. Mem. at 1.) That is misleading. Out of the 39 witnesses on Lead Plaintiff's list, only four have been deposed or are scheduled to be deposed in the coming months. Those four witnesses are all current and former CSFB employees, noticed for deposition by plaintiffs. Thus, Lead Plaintiff's suggestion that its list has aided CSFB in its discovery is disingenuous.

invade its work product, and that its confidential informants fear reprisal—have no basis in law or in fact. We therefore respectfully request that the Court order Lead Plaintiff to provide complete and specific answers to CSFB's interrogatories.

Argument

I. LEAD PLAINTIFF SHOULD BE ORDERED TO IDENTIFY THE CSFB EMPLOYEES QUOTED IN THE COMPLAINT AND THE SOURCES OF THOSE QUOTATIONS.

A. The Work Product Doctrine Does Not Apply to the Factual Information Requested by CSFB.

1. Interrogatory Nos. 15, 16 and 17.

In Interrogatory Nos. 15, 16 and 17, CSFB requested that Lead Plaintiff identify the CSFB employees quoted or referenced (but not identified) in specific allegations against CSFB in the Complaint, what they said and to whom. (See CSFB's Motion, Ex. A.) As we previously pointed out, CSFB requires this basic factual information to be able to challenge the core allegations that are the basis of Lead Plaintiff's claims against CSFB, and on which this Court relied in denying CSFB's motion to dismiss. (See id. at 2-4.)[2] Lead Plaintiff, however, has completely stonewalled CSFB—it has provided no answer at all to these interrogatories. We therefore seek the Court's intervention to order Lead Plaintiff to provide specific answers to these straightforward interrogatories.

It is unclear why Lead Plaintiff persists in its refusal to answer Interrogatory Nos. 15 through 17. Lead Plaintiff did not interpose any substantive objections to these

[2] In its opposition, Lead Plaintiff asserts that CSFB has no "substantial need" for the requested information because information regarding Enron has been available "for many months, if not years". (Opp. Mem. at 11-12.) Lead Plaintiff misses the point. CSFB has served proper interrogatories to learn the specific factual information on which Lead Plaintiff's allegations against CSFB are based. Absent that discovery, CSFB will be handicapped in its ability to challenge these allegations, which go to the heart of Lead Plaintiff's claim that CSFB acted with scienter.

interrogatories in its written responses, nor does Lead Plaintiff say one word about them in its opposition brief. Instead, Lead Plaintiff's opposition makes only an oblique reference to interrogatories that it claims implicitly "seek[] to determine the source for plaintiffs' factual allegation", rather than "seek to discover the facts", by requesting information about who made or heard particular alleged statements. (Opp. Mem. at 2-3 (emphasis in original).) According to Lead Plaintiff, this type of interrogatory invades Lead Counsel's work product.

Lead Plaintiff's belated work product objection is unfounded. Interrogatory Nos. 15 through 17 do not ask Lead Plaintiff to identify its sources. On their face, these interrogatories ask Lead Plaintiff to identify facts (who said what to whom) concerning certain alleged statements quoted or referenced in the Complaint's allegations against CSFB. This information is plainly discoverable—indeed, necessary for CSFB to be able to test the veracity of those allegations—and Lead Plaintiff cannot transform this discoverable information into a work product claim by generally asserting that providing answers to these interrogatories might incidentally allow CSFB to figure out some of Lead Plaintiff's sources.[3]

A similar attempt by plaintiffs to claim work product protection by conflating percipient witnesses with confidential sources was recently rejected in In re Initial Public Offering Securities Litigation, 220 F.R.D. 30 (S.D.N.Y. 2003) ("In re IPO"). In that case, plaintiffs alleged that certain underwriter defendants violated the securities laws by engaging in "Tie-in Agreements" with investors or by receiving "Undisclosed Compensation" from investors. Id. at 32. After their motions to dismiss were denied, the underwriter defendants served interrogatories asking plaintiffs to identify those investors, some of whom had provided

[3] In any event, as explained below, the source of particular information quoted in the Complaint is not protected by the work product doctrine.

information to plaintiffs' counsel that was used "[i]n framing their claims". Id. Plaintiffs refused to provide this basic information, claiming—as Lead Plaintiff does here—that the underwriter defendants were merely seeking the "identities of witnesses interviewed by counsel in preparation of this litigation, and which therefore demonstrate which witnesses the plaintiffs value most highly". Id. at 35. The court dismissed this argument as "the ubiquitous red herring". Id. The court explained: "Underwriters are not seeking the names of individuals interviewed by plaintiffs or relied upon in the complaint . . . . Rather, they are seeking the names of individuals who have personal knowledge of Tie-in agreements or Undisclosed Compensation." Id. (emphasis in original).[4] Accordingly, the court held that "the information requested by [the] Underwriters is not protected by the work product doctrine". Id. at 36.

Here, as in In re IPO, Interrogatory Nos. 15 through 17 seek only the names of CSFB employees who allegedly made certain statements quoted in the Complaint, and individuals who have personal knowledge of those alleged statements. The law is clear that these facts—which go to the heart of Lead Plaintiffs' scienter allegations against CSFB—are not work product. See Southern Scrap Materials Co. v. Fleming, No. Civ. A. 01-2554, 2003 WL 21474516, at *16-*17 (E.D. La. June 18, 2003); see also Upjohn Co. v. U.S., 449 U.S. 383, 395-96 (1981); Blum v. Spectrum Rest. Group-Employees Group Life & Supplemental Life Plan, Nos. 4:02-CV-92, 4:02-CV-98, 2003 WL 367059, at *2 n.1 (E.D. Tex. Feb. 18, 2003). Lead Plaintiff's suggestion to the contrary is, as the court in In re IPO put it, a "red herring".

[4] For that reason, the court concluded that the same three cases on which Lead Plaintiff relies in its opposition—Electronic Data Systems Corp. v. Steingraber, No. 4:02 CV 225, 2003 WL 21653405 (E.D. Tex. July 9, 2003), In re MTI Technology Corp. Securities Litigation II, No. SACV 00-0745 DOC, 2002 WL 32344347 (C.D. Cal. June 13, 2002), and In re Ashworth, Inc. Securities Litigation, 213 F.R.D. 385 (S.D. Cal. 2002)—were inapposite. See In re IPO, 220 F.R.D. at 35-36.

2. Interrogatory Nos. 18 and 19.

In contrast to Interrogatory Nos. 15 through 17, Interrogatory Nos. 18 and 19 ask that Lead Plaintiff identify the sources of the quotations in its factual allegations against CSFB. (See CSFB's Motion, Ex. A.) As we previously pointed out, this information is not only discoverable, it is essential for CSFB to be able to confront its accusers—as is its right—and challenge the allegations that are the basis of Lead Plaintiff's claims against CSFB. (See id. at 3-6.)[5] In response, Lead Plaintiff refers CSFB to a list of 39 persons "likely to have discoverable information Lead Plaintiff may use to support its claims". (Id., Ex. A at Ex. A.) Lead Plaintiff, however, has refused to link the specific names it has already disclosed to specific allegations, claiming this would "necessarily disclose Lead Counsel's work product". (Opp. Mem. at 1; see also id. at 1-5.) Lead Plaintiff's reliance on the work product doctrine is misplaced.

First, Lead Plaintiff put the quotations (and their sources) at issue in this litigation when it used them in making public allegations against CSFB. After placing these facts at issue, Lead Plaintiff should not now be heard to invoke the work product doctrine to preclude CSFB from taking discovery to challenge those allegations. See In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 307 (6th Cir. 2002); Aspex Eyewear, Inc. v. E'Lite Optik, Inc., 276 F. Supp. 2d 1084, 1092 (D. Nev. 2003); Tonti Props. v. Sherwin-Williams Co., No.

[5] Lead Plaintiff baldly asserts that CSFB requested source information from Lead Plaintiff "to attack the confidential sources for plaintiffs allegations" in "an improper end-run around Rule 11". (Opp. Mem. at 8.) The accusation that CSFB is seeking discovery for improper purposes is offensive and wrong. CSFB has requested Lead Plaintiff to identify its sources so that it may depose those sources, ascertain the facts that served as the purported basis for their alleged statements to Lead Plaintiff, and demonstrate that the allegation that CSFB acted with scienter is false.

Civ. A. 99-892, 2000 WL 506015, at *2 n.2 (E.D. La. Apr. 27, 2000); Guaranty Corp. v. Nat'l Union Fire Ins. Co., Civ. A. No. 90-2695, 1992 WL 365330, at *7 (E.D. La. Nov. 23, 1992).

In its opposition, Lead Plaintiff only attempts to distinguish the Aspex case. (Opp. Mem. at 4-5.) Lead Plaintiff does not, however, deny the well-settled point of law for which that case (and many others) stands—a litigant cannot use the work product doctrine as both a sword and shield, selectively using privileged communications to prove a point and then invoking the privilege to prevent an opponent from challenging the assertion. See Aspex, 276 F. Supp. 2d at 1092. That is exactly what Lead Plaintiff has done here. Lead Plaintiff put specific, exact quotations from its sources in a public complaint that raises allegations against CSFB, and now seeks to hide behind the work product doctrine to prevent CSFB from testing the veracity of those allegations. That is not a proper use of the work product doctrine. See In re Columbia/HCA, 293 F.3d at 307; Aspex, 276 F. Supp. 2d at 1092; Tonti, 2000 WL 506015, at *2 n.2; Guaranty, 1992 WL 365330, at *7.

Second, requiring Lead Plaintiff to identify which sources were the basis for specific allegations against CSFB does not invade Lead Counsel's work product. Although the few courts that have addressed this issue appear to be split, the better reasoned view was articulated in In re Aetna Inc. Securities Litigation, No. Civ. A. MDL 1219, 1999 WL 354527 (E.D. Pa. May 26, 1999), where the court rejected plaintiffs' work product objection and ordered specific "identification of supporting witnesses" who were quoted in plaintiffs' allegations. Id. at *1-3. Critically, in ruling that a general list of potential witnesses was insufficient to answer interrogatories seeking the unnamed sources for plaintiffs' allegations, the Aetna court explained: "The disclosure of the names and addresses of those individuals interviewed by

Plaintiffs' counsel will not reveal the 'mental impressions, conclusions, opinions, or legal theories of [Plaintiffs'] attorneys.'" Id. at *3 (quoting Fed. R. Civ. P. 26(b)(3)).

In its opposition, Lead Plaintiff tries to distinguish Aetna by pointing out that the list of names proffered by plaintiffs in that case was longer than the list of names Lead Plaintiff proffers here. (Opp. Mem. at 4.) That, however, is irrelevant. The core holding in Aetna was that sources used in a complaint are not work product. The fact that the plaintiffs in Aetna listed more names on their list than Lead Plaintiff does here does not change the fact that the identities of those sources are discoverable, regardless of whether the list is ten, or ten thousand, names long. Moreover, Lead Plaintiff does not mention in its opposition that it followed the same kitchen-sink list approach—naming at least 131 alleged witnesses—in response to similar interrogatories served by other parties to this action. We respectfully submit that this Court should not set a precedent in this litigation endorsing this approach.

Lead Plaintiff also asserts that Aetna is "unpersuasive" because it is based upon a misreading of the Third Circuit's decision in United States v. Amerada Hess Corp., 619 F.2d 980 (3d Cir. 1980), as "clarified" by Appeal of Hughes, 633 F.2d 282 (3d Cir. 1980). (See Opp. Mem. at 4.) That is wrong. Aetna, which was decided long after both cases, concluded in light of Amerada that information concerning sources has, at most, "minimal work product content". Aetna, 1999 WL 354527, at *2. That is completely consistent with Hughes, which—although not mentioned by Lead Plaintiff—in fact ordered the disclosure of the names of persons interviewed by the defense because "for the production of a mere list of persons interviewed the government's showing of need to overcome the nondisclosure privilege is comparatively low". Hughes, 633 F.2d at 289. Such a showing was made in Aetna and, we submit, has been made by CSFB here too.

This result makes sense. As in Aetna, CSFB is not seeking the production of interview notes or other documents that would reveal Lead Counsel's opinions or legal strategy; rather, CSFB is simply asking Lead Plaintiff to link the names of persons they have already identified with specific allegations in the Complaint. The work product doctrine was never meant to shield such facts—facts that Lead Plaintiff put at issue by using them affirmatively in its Complaint—from discovery. See In re Dayco Deriv. Sec. Litig., 99 F.R.D. 616, 624 (S.D. Ohio 1983) ("Defendants may discover the facts upon which Plaintiffs, and/or their counsel, base their allegations. Such facts include the names of witnesses from whom counsel obtained the information." (emphasis in original, citations omitted)); accord In re Theragenics Corp. Sec. Litig., 205 F.R.D. 631, 636 (N.D. Ga. 2002).[6]

The principal case on which Lead Plaintiff relies in its opposition—Electronic Data Systems Corp. v. Steingraber, No. 4:02 CV 225, 2003 WL 21653405 (E.D. Tex. July 9, 2003) ("EDS")—is not to the contrary. Incredibly, Lead Plaintiff asserts that EDS presents "the exact issue pending before this Court". (Opp. Mem. at 3.) As we previously explained (see CSFB's Motion at 6 n.2), in that case, EDS served a very broad interrogatory asking Steingraber to identify all "individuals who have been interviewed concerning the relevant allegations in the case". Id. at *1. Unlike here, where CSFB has asked Lead Plaintiff only to identify the source for quotations contained in the Complaint's particular allegations against CSFB, EDS sought information concerning the full factual investigation conducted by its opposing counsel. See id. The court found that this information was protected by the work product doctrine. See id. The

[6] For these reasons, we respectfully submit that the two California federal court cases on which Lead Plaintiff relies—In re MTI Technology Corp. Securities Litigation II, No. SACV 00-0745 DOC, 2002 WL 32344347 (C.D. Cal. June 13, 2002), and In re Ashworth, Inc. Securities Litigation, 213 F.R.D. 385 (S.D. Cal. 2002)—were wrongly decided.

discoverability of sources of particular statements quoted in a complaint—the information CSFB seeks here—was neither raised nor addressed by the court in EDS.

B. Unspecified and Unwarranted Fears of Retaliation Do Not Preclude Discovery.

In its opposition, Lead Plaintiff states that it has "refused to answer defendants' interrogatories on the grounds that, among other things, it would violate the privacy rights of [Lead Plaintiff's] individual confidential informants". (Opp. Mem. at 8.) During the meet and confer, Lead Plaintiff advised CSFB that this objection applies to only one of its sources. (See CSFB's Motion, Ex. B.) Lead Plaintiff's objection—premised on the so-called "informer's privilege" available to the government to protect the identity of its informants—has no merit.

First, Lead Plaintiff has not offered any evidence demonstrating the existence of a legitimate threat of retaliation against the one source it seeks to protect. There is no reason whatsoever—and none has been offered by Lead Plaintiff—that this one source should fear retribution from his or her current employer because he or she provided information about CSFB. Nor is there any reason to believe that CSFB, or any other defendant in this action, can or will retaliate against this particular source because it provided information about CSFB.

The Declaration of G. Paul Howes, dated July 7, 2004, is not to the contrary. In his declaration, Mr. Howes discusses the general fears expressed by "some few" out of the "scores" of former Enron employees interviewed by Lead Plaintiff. (Howes Decl. ¶ 2.) The declaration does not point to a single specific fact showing that the one source at issue here fears retaliation, let alone on what basis. And, as Mr. Howes candidly concedes, he did not make any "absolute guarantees that identities of those we interviewed would be protected from disclosure in the discovery process". (Howes Decl. ¶ 2.) Accordingly, this source had no expectation of privacy when he or she provided quotes about CSFB to Lead Counsel.

Second, even if Lead Plaintiff could make the required showing that the one source it is withholding has a valid expectation of privacy, the law still does not preclude disclosure to CSFB. The so-called "informer's privilege" recognizes that a stigma attaches to "former employees acting as informers" against their employers. MTI, 2002 WL 32344347, at *5; see also Mgmt. Info. Techs. v. Alyeska Pipeline Serv. Co., 151 F.R.D. 478, 481 (D.D.C. 1993) (informant was "within Alyeska"). That is not the case here. Lead Plaintiff's source appears to have been a former employee of Enron, not CSFB. (See Howes Decl. ¶ 2.) In contrast to cases where an informant provides information about his current or former employer, there is no reason to presume that any adverse consequences will result if the identity of an Enron employee who allegedly blew the whistle on CSFB were to become known to CSFB (or anyone else). Tellingly, Lead Plaintiff does not cite a single case suggesting that there is a public policy protecting informants who blow the whistle on companies other than the one at which they are or were employed.

Third, contrary to Lead Plaintiff's suggestion, the fact that Lead Plaintiff was not required under the PSLRA to disclose its sources at the pleading stage does not mean that it need not do so now. Facing a similar issue, the court in In re IPO explained:

> "The issue here does not raise the policy concerns addressed in the Sarbanes-Oxley legislation or the Novak rule [that witnesses need not be disclosed at the pleading stage under the PSLRA], both of which encourage whistle-blowers to expose corporate wrongdoing by protecting them from retaliation. Once a litigation is pending, the balance of interests change. While it is important to protect whistle-blowers, it is also important, once the whistle is blown, to allow all parties to engage in the robust discovery permitted by the Federal Rules." In re IPO, 220 F.R.D. at 37.

When "potential witnesses have information regarding the central allegations in the case", the "balancing of interests tips in favor of disclosure". Id. Here, the source at issue provided information concerning CSFB's alleged scienter, an issue of critical importance to this securities

fraud litigation. Thus, as in In re IPO, the identity of this witness must be disclosed, so that robust discovery of the facts can occur.

Fourth, if there is a danger of retaliation, Lead Plaintiff should apply for an appropriate protective order protecting against the broader public disclosure of this source and/or prohibiting retaliation. Lead Plaintiff's failure to do so is not sufficient reason to deny CSFB the discovery to which it is entitled. See In re Aetna, 1999 WL 354527, at *5 (ordering disclosure of sources and denying protective order "prohibiting any retaliatory acts" because plaintiff did not show that Aetna "has attempted to intimidate individuals connected with this case").

II. LEAD PLAINTIFF SHOULD BE ORDERED TO DISCLOSE OTHER FACTUAL INFORMATION ON WHICH ITS ALLEGATIONS AGAINST CSFB ARE BASED.

CSFB's Interrogatories 1 through 14 seek facts relating to allegations that were initially copied from a Financial Times article, as well as two meetings that allegedly took place during the Summer of 2001. (See Motion, Ex. A.) In its opposition, Lead Plaintiff represents that "the only additional information being withheld is the names of some confidential informants who spoke with Lead Counsel who fear retribution". (Opp. Mem. at 11.)[7]

One possible interpretation of Lead Plaintiff's representation is that it is withholding factual information concerning quotations and meetings described in its allegations against CSFB because straightforward answers to Interrogatories 1 through 14 would incidentally reveal Lead Plaintiff's sources. Like Interrogatories 15 through 17, Interrogatories 1 through 14 do not ask Lead Plaintiff to identify its sources—they specifically call for the facts

[7] It is unclear why Lead Plaintiff now refers to multiple "confidential informants" that "fear retribution" when Lead Plaintiff previously informed CSFB that only one source was being withheld on this ground. In any event, the same reasons Lead Plaintiff must be ordered to disclose the single source it mentioned during our meet and confer apply equally to any other sources Lead Plaintiff has failed to disclose on this basis.

relating to quotations and meetings described in Lead Plaintiff's own pleading. As explained above in Part I.A.1, this information is discoverable and, accordingly, Lead Plaintiff should be ordered to provide complete answers to Interrogatories 1 through 14.

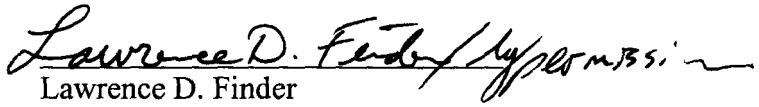
Another interpretation of Lead Plaintiff's representation is that Lead Plaintiff is unaware of any additional substantive information responsive to Interrogatories 1 through 14 (other than the names of its sources). If that is the case, Lead Plaintiff should clarify this in its written responses, and no further answer to Interrogatories 1 through 14—which do not request source information—would be required at this time.[8]

Conclusion

For the reasons stated above, we respectfully submit that Lead Plaintiff should be ordered to provide full and specific answers to CSFB's Interrogatories 1-19.

July 14, 2004

Respectfully submitted,



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[8] By contrast, in Interrogatories 18 and 19, CSFB asks Lead Plaintiff to identify the sources for the allegations against CSFB that are the subject of Interrogatories 1 to 14. As explained in Part I.A.2 and I.B, the identities of these sources are neither work product nor protected by any whistle-blower public policy concerns.

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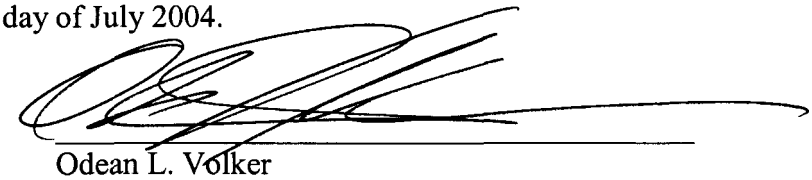
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on counsel electronically via the www.esl3624.com website pursuant to the Court's order in *Newby v. Enron Corp. et al.* on this 14th day of July 2004.



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